

1
2
3
4
5
6
7
8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**

10 CONDALEE MORRIS,
11 CDCR #V-96203,

12 Plaintiff,

13
14 vs.

15
16
17 M. BARRA; L. MILLS; D. WHITE;
18 G.J. JANDA; MACE; JANE DOE,

19 Defendants.
20
21
22

Civil No. 10-2642 AJB (BGS)

ORDER:

(1) **GRANTING MOTION TO
PROCEED *IN FORMA PAUPERIS***
[ECF No. 2];

(2) **DENYING MOTIONS TO
APPOINT COUNSEL PURSUANT
TO 28 U.S.C. § 1915(e)(1)**
[ECF Nos. 3, 9];

AND

(3) **DIRECTING U.S. MARSHAL
TO EFFECT SERVICE OF
SUMMONS AND FIRST AMENDED
COMPLAINT UPON DEFENDANTS
PURSUANT TO Fed.R.Civ.P. 4(c)(3)
AND 28 U.S.C. § 1915(d)**

23 Plaintiff, Condalee Morris, a prisoner currently incarcerated at the California Correctional
24 Institution located in Tehachapi, California, and proceeding pro se, has submitted a civil rights
25 Complaint pursuant to 28 U.S.C. § 1983. Plaintiff has not prepaid the \$350 filing fee mandated
26 by 28 U.S.C. § 1914(a); instead, he has filed a Motion to Proceed *In Forma Pauperis* ("IFP")
27 pursuant to 28 U.S.C. § 1915(a) [ECF No. 2], as well as two Motions for Appointment of
28 Counsel pursuant to 28 U.S.C. § 1915(e)(1) [ECF Nos. 3, 9].

Before the Court could conduct the required sua sponte screening pursuant to 28 U.S.C. § 1915(e)(2) & § 1915A, Plaintiff filed a First Amended Complaint (“FAC”) [ECF No. 7].

I.

Motion to Proceed IFP [ECF No. 2]

All parties instituting any civil action, suit or proceeding in a district court of the United States, except an application for writ of habeas corpus, must pay a filing fee of \$350. *See* 28 U.S.C. § 1914(a). An action may proceed despite a plaintiff’s failure to prepay the entire fee only if the plaintiff is granted leave to proceed IFP pursuant to 28 U.S.C. § 1915(a). *See Rodriguez v. Cook*, 169 F.3d 1176, 1177 (9th Cir. 1999). However, prisoners granted leave to proceed IFP remain obligated to pay the entire fee in installments, regardless of whether their action is ultimately dismissed. *See* 28 U.S.C. § 1915(b)(1) & (2); *Taylor v. Delatoore*, 281 F.3d 844, 847 (9th Cir. 2002).

Section 1915, as amended by the Prison Litigation Reform Act (“PLRA”), further requires that each prisoner seeking leave to proceed IFP submit a “certified copy of [his] trust fund account statement (or institutional equivalent) ... for the six-month period immediately preceding the filing of the complaint.” 28 U.S.C. § 1915(a)(2). Using these certified trust account statements, the Court must assess an initial payment of 20% of (a) the average monthly deposit, or (b) the average monthly balance in the account for the past six months, whichever is greater, and collect that amount as the prisoner’s initial partial filing fee, unless he has no current assets with which to pay. *See* 28 U.S.C. § 1915(b)(1); 28 U.S.C. § 1915(b)(4); *Taylor*, 281 F.3d at 850. Thereafter, the institution having custody of the prisoner must collect subsequent payments, assessed at 20% of the preceding month’s income, in any month in which his account exceeds \$10, and forward those payments to the Court until the entire filing fee is paid. *See* 28 U.S.C. § 1915(b)(2); *Taylor*, 281 F.3d at 847.

The Court finds that Plaintiff has submitted an affidavit that complies with 28 U.S.C. § 1915(a)(1) [ECF No. 2] as well as a certified copy of his prison trust account statement pursuant to 28 U.S.C. § 1915(a)(2) and Civil Local Rule 3.2. Plaintiff’s trust account currently indicates that he has insufficient funds from which to pay an initial partial filing fee.

Accordingly, the Court hereby **GRANTS** Plaintiff's Motion to Proceed IFP [ECF No. 2], and assesses no initial partial filing fee at this time. *See* 28 U.S.C. § 1915(b)(1) (court shall assess initial partial filing fee only "when funds exist"); 28 U.S.C. § 1915(b)(4) ("In no event shall a prisoner be prohibited from bringing a civil action . . . for the reason that the prisoner has no assets and no means by which to pay the initial partial filing fee."); *Taylor*, 281 F.3d at 850 (finding that 28 U.S.C. § 1915(b)(4) acts as a "safety-valve" preventing dismissal of a prisoner's IFP case based solely on a "failure to pay . . . due to the lack of funds available to him when payment is ordered."). However, Plaintiff is required to pay the full \$350 filing fee mandated by 28 U.S.C. §§ 1914(a) and 1915(b)(1), by subjecting any future funds credited to his prison trust account to the installment payment provisions set forth in 28 U.S.C. § 1915(b)(2).

II.

Sua Sponte Screening per 28 U.S.C. § 1915(e)(2) and § 1915A

The PLRA also obligates the Court to review complaints filed by all persons proceeding IFP and by those, like Plaintiff, who are "incarcerated or detained in any facility [and] accused of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms or conditions of parole, probation, pretrial release, or diversionary program," "as soon as practicable after docketing." *See* 28 U.S.C. §§ 1915(e)(2) and 1915A(b). Under these provisions, the Court must sua sponte dismiss any prisoner and all other IFP complaints, or any portions thereof, which are frivolous, malicious, fail to state a claim, or which seek damages from defendants who are immune. *See* 28 U.S.C. §§ 1915(e)(2)(B) and 1915A; *Lopez v. Smith*, 203 F.3d 1122, 1126-27 (9th Cir. 2000) (en banc) (§ 1915(e)(2)); *Resnick v. Hayes*, 213 F.3d 443, 446 (9th Cir. 2000) (§ 1915A); *see also Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998) (discussing § 1915A). "[W]hen determining whether a complaint states a claim, a court must accept as true all allegations of material fact and must construe those facts in the light most favorable to the plaintiff." *Resnick*, 213 F.3d at 447; *Barren*, 152 F.3d at 1194 (noting that § 1915(e)(2) "parallels the language of Federal Rule of Civil Procedure 12(b)(6)").

Here, the Court finds that Plaintiff's claims in his First Amended Complaint survive the sua sponte screening required by 28 U.S.C. §§ 1915(e)(2) and 1915A(b), and that Plaintiff is

1 therefore automatically entitled to U.S. Marshal service on his behalf as to those individuals.
 2 *See Lopez*, 203 F.3d at 1126-27; 28 U.S.C. § 1915(d) (“The officers of the court shall issue and
 3 serve all process, and perform all duties in [IFP] cases.”); FED.R.CIV.P. 4(c)(3) (providing that
 4 “service be effected by a United States marshal, deputy United States marshal, or other officer
 5 specially appointed by the court ... when the plaintiff is authorized to proceed *in forma pauperis*
 6 pursuant to 28 U.S.C. § 1915.”).

7 III.

8 Motion for Appointment of Counsel [ECF Nos. 3, 9]

9 Plaintiff also requests the appointment of counsel to assist him in prosecuting this civil
 10 action. The Constitution provides no right to appointment of counsel in a civil case, however,
 11 unless an indigent litigant may lose his physical liberty if he loses the litigation. *Lassiter v.*
 12 *Dept. of Social Services*, 452 U.S. 18, 25 (1981). Nonetheless, under 28 U.S.C. § 1915(e)(1),
 13 district courts are granted discretion to appoint counsel for indigent persons. This discretion may
 14 be exercised only under “exceptional circumstances.” *Terrell v. Brewer*, 935 F.2d 1015, 1017
 15 (9th Cir. 1991). “A finding of exceptional circumstances requires an evaluation of both the
 16 ‘likelihood of success on the merits and the ability of the plaintiff to articulate his claims pro se
 17 in light of the complexity of the legal issues involved.’ Neither of these issues is dispositive and
 18 both must be viewed together before reaching a decision.” *Id.* (quoting *Wilborn v. Escalderon*,
 19 789 F.2d 1328, 1331 (9th Cir. 1986)).

20 The Court denies Plaintiff’s request without prejudice, as neither the interests of justice
 21 nor exceptional circumstances warrant appointment of counsel at this time. *LaMere v. Risley*,
 22 827 F.2d 622, 626 (9th Cir. 1987); *Terrell*, 935 F.2d at 1017.

23 IV.

24 Conclusion and Order

25 Good cause appearing, **IT IS HEREBY ORDERED** that:

26 1. Plaintiff’s Motions for Appointment of Counsel pursuant to 28 U.S.C. § 1915(e)(1)
 27 [ECF Nos. 3, 9] are **DENIED**.
 28

2. Plaintiff's Motion to proceed IFP pursuant to 28 U.S.C. § 1915(a) [ECF No. 2] is
GRANTED.

3. The Secretary of California Department of Corrections and Rehabilitation, or his
designee, shall collect from Plaintiff's prison trust account the \$350 balance of the filing fee
owed in this case by collecting monthly payments from the account in an amount equal to twenty
percent (20%) of the preceding month's income and forward payments to the Clerk of the Court
each time the amount in the account exceeds \$10 in accordance with 28 U.S.C. § 1915(b)(2).
ALL PAYMENTS SHALL BE CLEARLY IDENTIFIED BY THE NAME AND NUMBER
ASSIGNED TO THIS ACTION.

4. The Clerk of the Court is directed to serve a copy of this Order on Matthew Cate,
Secretary, California Department of Corrections and Rehabilitation, 1515 S Street, Suite 502,
Sacramento, California 95814.

IT IS FURTHER ORDERED that:

5. The Clerk shall issue the summons upon Defendants, provide Plaintiff with a
certified copy of both this Order and his First Amended Complaint, and forward them to Plaintiff
along with a blank U.S. Marshal Form 285 for each of these Defendants. Plaintiff shall complete
the Form 285s and forward them to the United States Marshal. The U.S. Marshal serve a copy
of the First Amended Complaint and summons upon each individual Defendant as directed by
Plaintiff on each U.S. Marshal Form 285. All costs of service shall be advanced by the United
States. *See* 28 U.S.C. § 1915(d); FED.R.CIV.P. 4(c)(3).

6. Once served, these Defendants are thereafter **ORDERED** to reply to the First
Amended Complaint within the time provided by the applicable provisions of Federal Rule of
Civil Procedure 12(a). *See* 42 U.S.C. § 1997e(g)(2) (while Defendants may occasionally be
permitted to "waive the right to reply to any action brought by a prisoner confined in any jail,
prison, or other correctional facility under section 1983," once the Court has conducted its sua
sponte screening pursuant to 28 U.S.C. § 1915(e)(2) and § 1915A(b), and thus, has made a
preliminary determination based on the face on the pleading alone that Plaintiff has a
"reasonable opportunity to prevail on the merits," Defendants are required to respond).

